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IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. 387 Misc.

**UNITED STATES OF AMERICA, ex rel.
LLOYD ELDON MILLER, JR.,**

Petitioner,

vs.

**FRANK J. PATE, Warden of the Illinois
State Penitentiary, Joliet, Illinois,**

Respondent.

BRIEF OF RADIO STATION W-A-I-T (CHICAGO) AND THE ILLINOIS DIVISION, AMERICAN CIVIL LIBERTIES UNION AS AMICI CURIAE IN SUPPORT OF THE PETITION FOR CERTIORARI

INTERESTS OF THE AMICI.

Radio Station WAIT (Chicago) and the Illinois Division of the American Civil Liberties Union are here because they have come to believe that District Judge Decker's order of August 22, 1963, issued after the Illinois Supreme Court refused to act earlier on the same day and just seven hours before an electrocution, stayed Illinois from the unspeakable—the execution of an innocent man.

The American Civil Liberties Union is in this case because of its dedication to the principle that the decencies of procedural due process are at the very heart of a free society. Radio Station WAIT finds itself compelled by conscience to join in this amicus effort because its investigations as part of its news coverage of this case led to the disclosure of gross improprieties in the trial and circumstances establishing the innocence of the petitioner.

We are filing herewith the consent of both of the parties to our appearance here as amici.

ARGUMENT.

This case raises the central issue of the constitutional requirements for a fair trial. We submit that the court below seriously erred in its handling of an important question of federal law—the responsibilities of the prosecution with respect to exonerating evidence in its hands.

In this court the case pivots on a single fact. It is a fact not known to the jury or the defense or the court at the time of the original trial in 1956. It is a fact which was discovered eight years later only as a result of this federal habeas corpus proceeding. It is a fact furthermore which has been curiously misread both by District Judge Perry, even though he granted relief for other reasons, and by the Court of Appeals of the 7th in upsetting Judge Perry's order.

The crime involved is the hideous rape-murder in Canton, Illinois, on November 26, 1955, of an eight-year-old child, Janice May. Minutes after the attack, the victim was discovered still alive and taken to the hospital where she died. Within a half hour after her death, Dr. Raymond J. Mercy, the county coroner, examined the victim. A vaginal smear taken from the child was placed in a plastic container or vial identified with Dr. Mercy's initials, RJM, the victim's name and date of her death, and the sealed container was sent for analysis to the Illinois State Bureau of Criminal Investigation at Springfield. (Pet. Ex. 6; R. 149; R. 515; Abst. 90-91).(*)

The decisive fact is that upon laboratory analysis at Springfield, a human hair was discovered in the vaginal

(*) Abst., refers to printed abstract in Illinois Supreme Court. R., refers to printed appendix below.

smear by the state chemist (R. 149, 515-16; Pet. Ex. 6). When the defendant was arrested and interrogated, specimens of his pubic hair were promptly taken and turned over to the laboratory of the State Bureau, also for testing (Abst. 155; R. 149; Pet. Ex. 6; R. 516). The chemist reported to the prosecution (R. 124-25; R. 149; Pet. Ex. 6) that the defendant's pubic hairs did not match the one found in the vaginal smear (R. 149; Pet. Ex. 6; R. 515-16). The prosecution went to trial without any disclosure to the court or the defense of these facts (R. 124, 149, 515). As to this much of the story, there is no possible dispute.

And this much of the story is sufficient, we submit, for decision in this court. A foreign[1] human hair does not get into the vagina of a raped eight-year-old girl unless it is the pubic hair of the attacker. It is a gynecological commonplace that male pubic hairs are found in the vagina after intercourse.[2] Thus the fact that the hair

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[1] Any possibility that the hair came from the child herself is foreclosed by the record, and no one has made such a claim. She was only eight years old and blonde (A. 65). Miller has dark hair. If the hair had been blonde or considered as the child's own, the State would hardly have found it necessary to take a pubic hair from Miller and then subject it to the elaborate microscopic examination of the State laboratory.

[2] Indeed it is now axiomatic in crime detection techniques in sex cases to search for traces of pubic hair on the body of the victim. "In rape and in sex murders, the genitals of the victim .... should be carefully searched by a physician for traces of foreign hairs." Soderman and O'Connell, *Modern Criminal Investigation*, p. 184 (4th ed. 1952). "In cases of rape or sex-murder, pubic hair of the perpetrator will *often* be found on the victim. . ." (ital. added.) Herzog, *Medical Jurisprudence*, p. 780 (1931). "An examination of human

found in the child's body did not match Miller's hair demonstrates that Miller was not the attacker.

The significance of this item in the record cannot be over-estimated. It does not merely invite a conjecture that the defendant might be innocent; it compels the conclusion that he cannot be the attacker.

Certainly the prosecution understood the decisiveness of the hair comparison. Virtually their first move when they took the defendant into custody was to take a sample of his pubic hair to match against the telltale hair preserved in the vial. (Abst. 155; R. 515-16). When contrary to their expectations, the hairs failed to match (R. 149, Pet. Ex. 6), the prosecution, we repeat, chose to conceal that decisive fact from the defense and the trial court (R. 149).

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hair may provide important information in a variety of ways of which the following is typical . . . (2) In sexual cases such as rape where pubic hair from the victim may be found on the criminal's clothing or private parts *or that of the criminal on the clothing or private parts of the victim.*" (ital. added.) Gross, *Criminal Investigation,* p. 111 (5th ed. 1962). See also *U. S. Army Field Manual—Criminal Investigations,* p. 65 (July, 1951); Graver and Francisco, *A Clinical and Laboratory Evaluation of Rape,* 55 Tenn. Med. Assoc. Jour., p. 393 (Oct. 1962); Gonzales, et al, *Legal Medicine Pathology and Toxicology,* pp. 606-8 (2nd ed. 1954); Gordon, et al, *Medical Jurisprudence,* p. 731 (3rd ed. 1953), citing the 1923 English case of *Rex* v. *Karien,* where in a rape case a single strand of wool found in the vagina of the victim was matched against the scarf of the suspect and led to his identification and conviction. See also *State* v. *Andrews,* 86 R.I. 341, 134 A. (2d) 425 (1957) (laboratory analysis of pubic hair used in a rape-murder case to identify and convict).

This much of the story brings the case squarely within the principle of *Brady* v. *Maryland*, 373 U.S. 83, 83 Sup. Ct. 1194, 10 L.ed. 2d 215 (1963), and *U. S.* v. *Wilkins*, 326 F. 2d 135 (C.A. 2d 1964).

This is not the whole of the ugly story, however. The prosecution did more with the evidence of the hair comparison than to conceal that it exonerated Miller. Miller testified at the trial, out of the presence of the jury in connection with the court's consideration of the admissibility of his confession, that the prosecution had attempted to induce him to confess by asserting to him that his pubic hairs *did* match hairs found in the little girl (Abst. 162). This lie has never been denied by the State. Later the prosecution also misrepresented to Miller's counsel the nature of the hair evidence in their possession. After repeated efforts, Miller's counsel were permitted to look at the State's physical evidence. The inventory of prosecution items exhibited to them included unidentified hairs *but did not include the official exonerating report of the State's chemist* (R. 193). Under the circumstances, this omission by the prosecution amounted to a false representation[3] to the defense that the prosecution had powerfully incriminating hair evidence, whereas in fact the hair evidence they had was actually exonerating. This alone should vitiate the conviction. See *Brady* v. *Maryland, supra*.

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[3] Actionable fraud today includes omissions making a disclosure misleading. See *e.g.* Securities Act of 1933, as amended, §§11(a), 12, 24; 15 U.S.C.A. §§77k(a), 771, 77x. Are public prosecutors in capital cases governed by a lesser standard of honesty than underwriters and issuers of securities?

It has been emphasized that the evidence about the hair comparison was suppressed for eight years and therefore was not available prior to the current habeas corpus proceeding. It was available, however, to the two courts below. Their response to it requires a word. District Judge Perry tersely and mysteriously dismissed the failure of the prosecution to disclose it, finding specifically that it was "of no consequence and did not prejudice petitioner's case." At least Judge Perry's response was in the context of his order requiring the State to re-try Miller, thus compelling the State to examine anew into Miller's guilt or innocence. The response of Judge Schnackenberg of the Court of Appeals is, however, in a capital case, unnerving! He has offered as one explanation of the hair found within the vagina of a raped eight-year-old child, who had been in professional medical custody virtually since the moment of attack, that the hair might have arrived there as a result of "the accidental depositing of the surface hair from the hands, arms or head of any of the examiners".(4) On the basis of this

(4) Judge Schnackenberg is rashly assuming that hairs from the head, arms, pubic regions and other parts of the body are homogeneous. It appears, however, that hairs from various parts of the body have markedly different characteristics and can be readily identified microscopically by those with proper training. See Loth, *The Crime Lab—Science Turns Detective,* p. 53-56 (1964). The science of hair analysis is so advanced, incidentally, that it is said to have been possible to detect from a single strand of Napoleon's hair some 140 years after his death that he was systematically poisoned by arsenic on St. Helena. See Loth, *op. cit.,* p. 158. The state laboratory obviously regarded the hair found in the vagina of the victim as coming from the pubic area of the attacker because the hair samples it took from Miller for comparative purposes were taken from his pubic region, not from his head, arms or legs.

theory, unsupported by anything in the record, that a hair *within the child's vagina* could as probably have come from her doctor as from her attacker, he finds it unnecessary to pass on the applicability of *Brady* v. *Maryland* or *U. S.* v. *Wilkins.*[5]

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One would expect that a case bearing such serious flaws would show telltale strains elsewhere. And so it is. As this case progresses, increasingly other flaws and strains manifest themselves. We now outline some of these, without exploring them in detail:

A. The Confession

1. The account in the confession of the blow to the child's head which caused her death is now seen to be flatly incompatible with the professional description and analysis of the multiple concussions found in the autopsy report (R. 127-41).

2. The description of the sex act as described in the confession cannot be reconciled with the medical evidence concerning the ruptures of the poor child's genitalia (*cf.* R. 29 and R. 997 with Judge Schnackenberg's medical resume of the injuries in *Miller* v. *Pate,* 300 F. 2d 414, 418 (C.A. 7th, 1962), note 4, recited by him in *Miller* v. *Pate,* 342 F. 2d 646, 652 (C.A. 7th, 1965), note 5).

3. The confession has the defendant state that to dispose of clothing blooded by the crime, he threw it into

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[5] Judge Schnackenberg's other explanation of the hair turns on the damaged condition of the child's body when found. Obviously the description of the victim is appalling, but there is nothing in that description to suggest that the hair found in her vagina was not that of the attacker.

a passing freight train (R. 30). It is now known that there was no such passing freight train at the time in question (R. 43, 54; Abst. 315; *cf.* R. 1037-40).

4. The confession makes much of a pair of blood-stained, small-sized jockey shorts which were conspicuously displayed as an exhibit at the trial (Abst. 270, 662). According to the confession, minutes after the crime, the defendant, under a curious impulse of delicacy, removes his bloody shorts and discards them in a building near the scene of the crime (R. 29). But he immediately dons his bloody pants and bloody jacket and walks home through the main streets of Canton, Illinois, on a Saturday afternoon (R. 29, 1005). It is now known that if a person of the defendant's size and build tried to put them on he would tear apart shorts of the size offered as the prosecution exhibit at the trial (R. 182).

5. It is now known too, solely as a result of this federal habeas corpus proceeding, that the heavy reddish-brown stains all over the jockey shorts, giving them as gruesome an appearance today (Pet. Ex. 9) as at the time of the original trial (R. 506), were paint not blood (R. 619-45), and it is clear that the prosecution knew all along that it was parading paint-stained shorts before the jury and the court but calling them blood-stained (R. 580-83). The evidence it produced on the point at the original murder trial, if not downright perjured, amounted at least to a calculated misrepresentation.(*) *Cf. Napue v. Illinois*, 360 U.S. 264 (1959).

(*) Whether or not there was some blood on the shorts, it is now clear that they were predominantly covered with paint. One of the prosecuting counsel had the audacity to argue in the federal habeas corpus proceeding, *after*

6. The confession has the defendant discard a second item of clothing, an old and torn grey jacket, many miles from where the shorts were found (R. 30). It now appears at least highly probable that this jacket exhibited at the trial never belonged to the defendant (R. 887-88; R. 895; R. 162).

7. These two items of clothing, the shorts and the jacket, do not corroborate the confession in the sense that the confession led the police to their discovery. On the contrary, they were already in the hands of the police at the time the confession was negotiated. (R. 995, 1007-9, 1075). The prosecutor misrepresented this sequence to the jury in his closing argument at the original trial. (*Cf.* Abst. 527 and R. 995, 1007-9; see also R. 571-2, 578).

8. The confession was taken from the defendant only after a 52-hour detention period, during which he was

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the evidence of the paint came out then for the first time, that *everyone* knew this all along at the trial (R. 684). Everyone perhaps on the prosecution's side, but not the court, the jury or the defense. The testimony was cleverly manipulated to create the impression that *all* of the staining material on the shorts was blood. The testimony *in toto* on the point at the trial was as follows (Abst. 270):

> "I examined and tested 'People's Exhibit 3' to determine the nature of *the staining material* upon it. The result of the first test was that *this material* upon the shorts is blood. I made a second examination which disclosed that the blood is of human origin. I made a further examination which disclosed that the blood is of group 'A'." (Ital. added.)

The shorts along with other exhibits have been sent up to this Court. One need only to view them to realize acutely how they and the misleading testimony quoted must have inflamed the jury and the trial judge.

not represented by counsel (R. 994, 1001). In negotiating for the confession, the prosecution, as previously indicated, misrepresented to the defendant that exonerating hair evidence incriminated him (Abst. 162). The confession was not in the defendant's handwriting (R. 1004) nor even in his words because, we are now told, "it was difficult for him to state—put into words what he meant" (R. 1021), a difficulty which the police solved by putting it into their words (R. 1022). *Cf. Escobedo* v. *Illinois*, 378 U.S. 478 (1964).

B. A Key Witness Recants

The confession apart, all that is left in the prosecution's case is the testimony of Betty Baldwin, who testified at the trial that the defendant admitted the crime to her while carrying her as a fare in his taxi-cab after the crime (R. 701-22). In the light of everything known about the case now, it is not at all surprising that in this habeas corpus proceeding Betty Baldwin now comes forward to recant her testimony (R. 235-434), the circumstance which influenced Judge Perry to order a new trial (R. 71-2). It is now clear that at the time the prosecution offered Betty Baldwin as a witness against the defendant, they had every reason to know she was psychologically unstable and wholly unreliable (R. 566, 686, 413, 419, 455).

C. Five Exonerating Witnesses Come Forward

It is not surprising either that years after the trial, five witnesses have now been found who establish the defendant's innocence. The proprietor of the defendant's rooming house, Alice Baxter, her husband and her two grandchildren testified that the defendant, a night-shift taxi driver, was asleep in his room at the time the murder

was known to have been committed, was awakened by the children at Mrs. Baxter's request, and, also at her request, then took a medical prescription to be filled for her at a neighboring drugstore (R. 813-85). The fifth witness, the druggist who filled the prescription, now corroborates that the defendant was in his store at the time defendant testified at the original trial he was and for the purpose of filling that prescription (R. 974-92).

D. The Hampering Strategy Used By The Prosecution Against Defense Counsel

Throughout the trial the defense counsel, who were trying their first jury or criminal case (R. 912, 939), were deliberately blocked at every point by prosecution strategy.

1. The exonerating hair comparison, as demonstrated above, was concealed from them and its nature misrepresented to them.

2. They were not permitted access to the shorts and the jacket for scientific testing (Abst. 9; R. 193-94).

3. Possible witnesses for the defense, such as Alice Baxter, were misinformed by the prosecution with calculated ambiguity that the witnesses had "a constitutional right" not to talk to the defense (R. 1098-99; *cf.* R. 1092) —and this by public officials in a small town so aroused and hostile to the defendant that the venue of the trial was changed to a neighboring county because it was impossible locally to recruit an unprejudiced jury panel to try him (Abst. 4-5). Under the circumstances prevailing, this message from public officials could only be understood by lay people as a warning to remain silent and they did (R. 943).

4. And finally, defense counsel were kept under the shadow of an *ex parte* contempt of court citation issued at the request of the prosecution (R. 1088-89) before the trial (Abst. 49-54; R. 195-97; R. 950-52), on the basis of an affidavit of Betty Baldwin (R. 1089). This proceeding never moved to adjudication (R. 195-7, 953) since presumably it had served its purpose to hamper the defendant's efforts to secure a fair trial (R. 953-55; 962; 197).

CONCLUSION.

We need not remind this court of the great phrases of *Brady* v. *Maryland*, 373 U.S. 83, 87:

> "The principle of *Mooney* v. *Holohan* is not punishment of society for misdeeds of a prosecutor but avoidance of an unfair trial to the accused. Society wins not only when the guilty are convicted but when criminal trials are fair; our system of the administration of justice suffers when any accused is treated unfairly."

Surely, surely these grand principles of a fair trial for all clamor for application in a case where the actions of the prosecution have operated to conceal the innocence of the defendant.

Respectfully submitted,

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